Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

MICHAEL AMALFITANO,

Petitioner,

-v.-

UNITED STATES,
THE FEDERAL ELECTION COMMISSION, and
JOHN ASHCROFT, in his official capacity as
ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

TODD C. BANK, ESQ.
Attorney for Petitioner
119-40 Union Turnpike
Fourth Floor
Kew Gardens, New York 11415
(718) 520-7125

26pp

QUESTIONS PRESENTED

1. Whether the lower courts were correct in holding that the inability of Petitioner to meaningfully communicate with his State Legislature with respect to the State's involvement in federal voter registration procedures required by the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg *et seq.* hereinafter ("NVRA"), in that the NVRA prohibits the Legislature from responding to Petitioner's requests, does not constitute injury to Petitioner because of the possibility that the State would refuse to perform its duties under the NVRA.

2. Whether the lower courts were correct in holding that the inability of Petitioner to meaningfully communicate with his State Legislature with respect to the State's involvement in federal voter registration procedures required by the NVRA, in that the NVRA prohibits the Legislature from responding to Petitioner's requests, does not constitute injury to Petitioner because the State itself could bring a constitutional challenge to the NVRA.

3. Whether the lower courts were correct in holding that the inability of Petitioner to meaningfully communicate with his State Legislature with respect to the State's involvement in federal voter registration procedures required by the NVRA, in that the NVRA prohibits the Legislature from responding to Petitioner's requests, does not constitute injury to Petitioner because of the possibility that numerous other individuals may have also wished to engage in the same activities in which Petitioner had wished to engage.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the District Court is reported at 2001 WL 103437, 2001 U.S. Dist. LEXIS 1128 (S.D.N.Y. 2001) (Wood, D.J.), and is reprinted in A3-A8. The opinion of the United States Court of Appeals for the Second Circuit is reported at 2001 WL 1268215, 2001 U.S. App. LEXIS 22861 (Carman, C.J., Kearse, Newman, JJ.), and is reprinted at A1.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on October 16, 2001 (*See* A1). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the Constitution provides in pertinent part: The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution...to Controversies to which the United States shall be a Party...

STATEMENT OF THE CASE

Under the NVRA, the States are compelled to administer a federal voter registration program, except those States with no federal voter registration requirements and those which allow voters to register at the polling place at the time of voting for general elections for federal offices. 42 U.S.C. §§ 1973gg-2(b)(1) and (b)(2).

1. Petitioner is a citizen of the State of New York who had wished to petition, and communicate with, the New York Legislature in the hope that it would repeal the legislation which it had enacted in the State's efforts to comply with the NVRA, including, but not limited to, parts of New York Election Law §§ 3-102, 5-211, and 5-212. *See* Compl. ¶ 5. In addition, Petitioner also wished to persuade the Legislature to prohibit those State agencies which participated in federal voter registration activities, as required by NVRA, from continuing to do so. *Id.* However, Petitioner did not engage in such actions solely because his ability to petition, and communicate with, his Legislature in a meaningful manner with respect to these issues had been rendered futile by the NVRA. *See Id.*

2. Respondents are the United States, The Federal Election Commission, and John Ashcroft (formerly Janet Reno), in his official capacity as Attorney General of the United States. The last two Respondents are charged with enforcing the NVRA. 42 U.S.C. §§ 1973gg-7 and 1973gg-9.

3. Petitioner brought this action in April, 2000 to challenge the constitutionality of the NVRA. His complaint, filed in the Southern District of New York, stated that the NVRA, by forcing the States to act as agents for the Federal Government, violates the principles of federalism that led this Court in *Printz v. United States*, 521 U.S. 898 (1997), to strike down the Brady Handgun

Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, and in *New York v. United States*, 505 U.S. 144 (1992), to strike down the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b *et seq*. *See* Compl. ¶ 3. Furthermore, the manner by which the NVRA delegates the power to appoint chief State election officials, 42 U.S.C. § 1973gg-8, violates Article II (the Appointments Clause) of the Constitution because the chief State election officials are at least Inferior Officers of the United States who therefore must be appointed pursuant to Article II, Section 2. *See* Compl. ¶¶ 4, 33. Finally, the NVRA is not valid under Article I, Section 4 of the Constitution, nor is it supported by either the Fourteenth or Fifteenth Amendments. Petitioner sought declaratory and injunctive relief. Federal jurisdiction of this case was proper pursuant to 28 U.S.C. §§ 1331 and 2201.

4. Respondents moved to dismiss Petitioner's complaint on the ground that he lacked standing. On February 7, 2001, the District Court issued a memorandum and order granting Respondents' motion, and on February 13, 2001, the District Court entered a judgment to that effect. First, the District Court stated that Petitioner "has not proven that he has suffered a concrete harm" because "the state is not bound by the [NVRA]" due to the fact that it "could, if it chose, follow the lead of other states and either repeal the state statute or bring suit against the federal government to challenge the validity of the federal statute" (A4). Second, the District Court ruled that Petitioner's "injury is not particularized" because he "does not establish that he personally suffered any harm," adding that "[t]he Supreme Court has clearly held that generalized and abstract grievances that affect large numbers of Americans alike are best addressed in the political process, not the judicial system," (A4-A5), citing *Federal Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998).

5. The Court of Appeals affirmed the ruling of the District Court by summary order.

REASONS FOR GRANTING THE WRIT

The decision of the District Court directly conflicts with precedents of this Court, particularly *Federal Election Comm'n v. Akins*, 524 U.S. 11 (1998). In failing to acknowledge these precedents, the District Court invented new barriers to standing.

First, the District Court held that the ability of a third party, in this case the New York Legislature, to violate a federal law by refusing to perform its duties under such law rendered Petitioner without standing to challenge the law himself.

Second, the District Court held that the ability of that same third party to bring a Constitutional challenge to a Federal law rendered Petitioner without standing to challenge the law himself.

Third, the District Court held that a significant change to the relationship which had existed between Petitioner and his State Legislature prior to the enactment of the NVRA did not constitute injury because of the possibility that numerous other individuals may have been likewise affected by the NVRA, despite the fact that this Court has never held that the number of individuals who share, or might share, a plaintiff's injuries, shall, *ipso facto,* prevent such plaintiff from bringing suit. If unreviewed, the lower courts' rulings will seriously undermine the doctrine of standing and thereby pose significant new restrictions upon individuals wishing to seek redress in the courts.

In *Akins*, *supra*, this Court held that a group of voters had standing to challenge the Federal Election Commission's decision not to require, under the Federal Election Campaign Act of 1971,

2 U.S.C. § 431 *et seq.*, an organization to disclose information concerning its political fundraising operations. *Akins* explicitly rejected the argument that there could not be standing where the "asserted harm ([the group's] failure to obtain information) is one which is shared in substantially equal measure by all or a large class of citizens," *Akins*, 524 U.S. at 23 (internal quotations and citations omitted).

The ruling of the District Court that Petitioner did not have standing to challenge the NVRA was based upon the mischaracterization both of the nature of Petitioner's claimed injuries and the NVRA itself. First, the District Court stated that the injury of which Petitioner complained is that "the NVRA prevents him from being able to petition and communicate with the New York State legislature." However, that is simply not what Petitioner alleged. Rather, he asserted that he had

> wished to petition, and communicate with, the New York Legislature in the hope that the legislature would repeal that legislation which had been enacted in the State's efforts to comply with the Act...as well as enact legislation which would prohibit those State agencies which currently participate in federal voter registration activities, as required by the Act, from continuing to do so; however, Petitioner did not engage in such actions solely because his ability to petition, and communicate with, the New York legislature *in a meaningful manner* with respect to these issues *has been rendered futile* by the Act.

Compl. ¶ 5 (emphases added).

The second mischaracterization of the District Court was its statement that Petitioner "has not proven that he has suffered a concrete harm" because "the state is not bound by the [NVRA]" (A4). However, the District Court itself noted that "[t]he NVRA

imposes requirements on states," and that "[i]n 1994, the State of New York enacted State law to comply with the federal requirements," *id.*; thus, the District Court's statement that New York is not bound by the Act simply does not make sense. Specifically, the Act states that "[e]xcept as provided in subsection (b) of this section, notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State *shall establish procedures* to register to vote in elections for Federal office..." 42 U.S.C. §§ 1973gg-2(a) (emphasis added).

The District Court's opinion that Petitioner lacks standing due to the theoretical possibility that the New York Legislature might violate federal law by refusing to perform its duties under the NVRA means that one's standing to challenge a law shall be denied because of the possibility that the very law being challenged might be broken. That position is simply untenable.

The distinction drawn by the *Akins* Court between cases which had ruled that a litigant did not have standing with respect to an injury that had also been sustained by numerous individuals, and those cases in which such a litigant did have standing, makes clear that even if numerous other individuals shared Petitioner's injuries, such fact would not negate his standing:

> [T]he Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance. *Warth [v. Seldin*, 422 U.S. 490, [] 500 [(1975)]; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U. S. 208, 222 (1974); [*United States v.] Richardson*, 418 U. S. [166], [] 179 [(1974)]; *Id.*, at 188-189 (Powell, J., Concurring); *see also Flast [v. Cohen*, 392 U. S. 83], [] 131 [(1968)] (Harlan, J.,

Dissenting).

> The kind of judicial language to which the FEC points, however [in its effort to show that the voters did not have standing], invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature -- for example, harm to the "common concern for obedience to law."
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> ***
>
> Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found "injury in fact."
>
> ***
>
> [T]hat a political forum may be more readily available where an injury is widely shared...does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an "injury in fact."

Akins, 524 U.S. at 23-25.

Given that the mere fact that Petitioner's injuries might be shared by numerous other individuals does not by itself defeat his standing, the question of whether he has standing must depend upon the qualitative nature of his injuries. If Congress had passed a law stating that members of the New York Legislature may not respond to any petitions or other acts of communication made specifically by Petitioner with respect to the State's involvement in federal voter registration activities, surely he would have standing to challenge such a law, no matter what the merits of such a challenge. Here, the only difference between that hypothetical law and the NVRA is that the latter does not single out Petitioner, a distinction which, as *Akins* makes clear, does not defeat his standing.

Finally, it should be noted that it is of no relevance that Petitioner does not have a constitutional right to have the Legislature respond to his wishes. An activity does not need to be constitutionally protected in order for one to challenge, on constitutional grounds, a law that negatively affects that activity. In *Clinton v. City of New York*, 524 U.S. 417 (1998), for example, the plaintiffs claimed injury with respect to tax provisions that the President had stricken pursuant to his authority under the Line Item Veto Act, 2 U.S.C. §§ 691-692. The plaintiffs were found to have standing simply because the alleged injuries were "'fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief,'" *Clinton*, 524 U.S. at 430, n.15, quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Like Petitioner's interest in engaging in meaningful communication with his Legislature, the harm alleged in *Clinton* was not professed to be constitutional in nature, in that there was no claim of a constitutional right to the tax treatment which the plaintiffs sought; rather, like here, the plaintiffs in *Clinton* were able to seek redress simply because their injuries, although non-constitutional in nature, were the result of an allegedly unconstitutional law. Thus, just as the plaintiffs in *Clinton* had standing in the absence of any general constitutional right to their desired tax treatment, so to does Petitioner have standing even though he does not have a constitutional right to have his legislature respond to his wishes, because of the simple fact that the relationship he had with his legislature was negatively affected by the NVRA in a clear and concrete manner.

Even if Petitioner were to prevail and then engage in meaningful communication with his legislature, his requests might not be acted upon; however, that likelihood does not vitiate his standing, as made clear by the *Akins* Court:

> Of course, as the FEC points out, it is possible that even had the FEC agreed with respondents' view of the law, it would still have decided in the exercise of its discretion not to require [the organization] to produce the information [concerning its political fundraising and contributions]... But that fact does not destroy Article III "causation," for we cannot know that the FEC would have exercised its prosecutorial discretion in this way... If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case -- even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason. *SEC v. Chenery Corp.*, 318 U. S. 80 (1943). Thus respondents' "injury in fact" is "fairly traceable" to the FEC's decision not to issue its complaint, *even though the FEC might reach the same result exercising its discretionary powers lawfully*. For similar reasons, the courts in this case can "redress" respondents' "injury in fact."

Akins, 524 U.S. at 25 (emphasis added).

Petitioner's injuries would clearly be redressed if he were granted the relief sought herein. Because the New York Legislature would then have the option of acting upon his requests, Petitioner would be able to communicate with the Legislature in a meaningful way; that is, in the environment which normally surrounds such communication, in that the Legislature would be able to respond to his requests. In the absence of the relief sought herein, on the other hand, the current environment would continue to exist, in which any communication between Petitioner and the Legislature would be rendered futile. In sum, Petitioner has clearly satisfied the criteria for standing.

> In *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561 (1992), we held that, to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-81 (2000).

A finding that Petitioner has standing would not *ipso facto* give any individual standing to challenge any federal law. That is because State Legislatures have never been able to change federal laws that operate upon the Federal Government itself or upon the people directly; nor have State Legislatures ever been able to change federal laws merely because they operate upon the States in a non-State capacity. Federal minimum wage laws, for example, apply to States in their capacity as employers; such laws do not apply to States *qua* states. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985) (noting that States "face[] nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet").Thus, nothing about such laws changes in any way the normal relationship that exists between a citizen of a State and his legislature, and, therefore, whether such laws confer standing upon citizens of States upon the grounds that they are unable to effectively seek to change the effects of such laws by petitioning and communicating with their State legislature is an entirely different question than the one presented in here. Of course, the NVRA, on the other hand, does operate upon the States qua states, and thereby does address a subject matter, *i.e.,* State law and policy carried out by States *qua*

States, about which a citizen normally has the ability to meaningfully communicate with his legislature.

Finally, inasmuch as Petitioner could have requested the New York Legislature to bring a constitutional challenge against the NVRA, that simply is not the request Petitioner wishes to make to his legislature. In any event, while New York itself could challenge the NVRA, until the success of such a challenge for Petitioner would continue to satisfy the elements of standing.

In sum, the rulings below wrongly denied standing to Petitioner, whose relationship with his legislature was harmed by a federal law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

TODD C. BANK, ESQ.
Attorney for Petitioner
119-40 Union Turnpike
Fourth Floor
Kew Gardens, New York 11415
(718) 520-7125

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number: 01-6046; Date of Entry: Oct. 16, 2001

----------X

MICHAEL AMALFITANO,

Plaintiff-Appellant,

-v.-

UNITED STATES, THE FEDERAL ELECTION COMMISSION, and JOHN ASHCROFT, in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES,

Defendants-Respondents.

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SUMMARY ORDER

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated in Judge Wood's order dated February 7, 2001.

We have considered all of plaintiff's contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk

By: /s/ Lucille Carr

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DECISION AND ORDER

Docket Number: 00-CIV-3229 (KMW); Date of Entry: Feb. 14, 2001

----------X

MICHAEL AMALFITANO,

Plaintiff,

-v.-

UNITED STATES, THE FEDERAL ELECTION COMMISSION, and JANET RENO, in her official capacity as ATTORNEY GENERAL OF THE UNITED STATES,

Defendants.

----------X

WOOD, U.S.D.J.:

Michael Amalfitano ("plaintiff") has brought this action for declaratory and injunctive relief challenging the constitutionality of the National Voter Registration Act. The United States, the Federal Elections Commission, and Janet Reno ("defendants") have moved the court to dismiss the action, pursuant to Fed. R. Civ. P. 12 (b) (1) ; for lack of subject matter jurisdiction.

I. Background

In 1993, Congress passed the National Voter Registration Act ("NVRA") , 42 U.S.C. 1973gg et seq., "to establish procedures that will increase the number of eligible citizens who register to vote in election for Federal office." 42 U.S.C. 1973gg (b) (1) . The NVRA imposes requirements on states such as that states enable motor vehicle registration forms to serve as voter registration forms, state public assistance offices serve as agencies for federal voter registration, and states create a mail-in voter registration form that does not require notarization. In 1994, the State of New York enacted state law to comply with the federal requirements. N.Y. Sess. Laws, ch. 659.

Plaintiff alleges that the NVRA prevents him from being able to petition and communicate with the New York State legislature. Specifically, plaintiff states that:

> [He] is a citizen of New York who wished to petition, and communicate with, the New York legislature in the hope that the legislature would repeal that legislation which had been enacted in the state's efforts to comply with the [NVRA] . . . ; however, plaintiff did not engage in such actions solely because his ability to petition, and communicate with, the New York legislature in a meaningful manner with respect to these issues has been rendered futile by the Act.

Complaint ¶ 5.

II. Discussion

To have subject matter jurisdiction, the court must determine that plaintiff has standing to bring suit. See Lucian v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); In re U.S. Catholic Conference, 885 F. 2d 1020, 1023 (2d Cir. 1989). To establish standing, plaintiff must plead: (1) injury in fact, (2) causation, and (3) redressability. See Lujan, 504 U.S. at 560 -61.

Defendants move to dismiss on the ground that plaintiff fails to satisfy the first prong of the standing test. See Defendant's Memorandum of Law in Support of Their Motion to Dismiss, dated July 3, 2000, at p. 1. The first prong requires that plaintiff prove that he has an injury in fact that is "both concrete in nature and particularized to [him] ." In re U.S. Catholic Conference, 885 F.2d at 1023-24 . Plaintiff must plead that he has been "directly affected by the . . . practices against which [his] complaint [] [is] directed." Valley Forge Christian College v. American United for Separation of Church & State, Inc., 454 U.S. 464 n. 22 (1982).

Plaintiff claims that he has suffered an injury due to the fact that "under the [NVRA], the New York State legislature is prohibited from acting upon the requests which Plaintiff wished to make to it." Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss ["Pl.'s Mem. Of Law"], dated July 28, 2000, at p. 5. He argues that he has been deprived of "the relationship which normally exists between a citizen of a state and his legislature, in which such a citizen can request his legislature to make changes in state law and state policy, and the legislature can grant such requests. "[1] Id . at p. 2.

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[1] Plaintiff states that he does not allege a violation of his First Amendment right to petition the state government. In fact, plaintiff concedes that defendants are "of course, correct in stating that the

The Court finds that plaintiff lacks standing for at least two reasons. First, plaintiff has not proven that he has suffered a concrete harm. As explained by defendants, the state is not bound by the federal statute. To the contrary, the state could, if it chose, follow the lead of others states and either repeal the state statute or bring suit against the federal statute. See ACORN v. Miller, 129 F.3d 833 (6th Cir. 1997) ; ACORN v. Edgar, 56 F.3d 791 (7th Cir. 1995); Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995) ; See also New York v. United States, 505 U.S. 144 (1992) (case in which New York State challenged the constitutionality of a federal statute) Second, the injury is not particularized. Plaintiff does not establish that he personally has suffered the alleged injury. The Supreme Court has clearly held that generalized and abstract grievances that affect large numbers of Americans alike are best addressed in the political process, not the judicial system. See Federal Election Comm'n v. Akins, 422 U.S. 11, 23 (1998) (citing, inter alia, Warth v. Seldin, 422 U.S.490, 500 (1975) ; Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 222 (1974)) .

III. Conclusion

Because plaintiff fails to set forth a judicially cognizable injury in fact, the Court dismisses the action for lack of subject matter jurisdiction. The clerk of court is directed to close this case. All pending motions are moot.

[NVRA] does not explicitly prohibit plaintiff from petitioning, or communicating with, his State legislature with respect to his wishes. See P1 's Mem. Of Law at p. 4.

SO ORDERED

DATED : New York, New York
February 7, 2001

JAMES M. PARKISON
Clerk of the Court

By: /s/
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL JUDGMENT

Docket Number: 00-CIV-3229 (KMW); Date of Entry: Feb. 14, 2001

----------X

MICHAEL AMALFITANO,

Plaintiff,

-v.-

UNITED STATES, THE FEDERAL ELECTION COMMISSION, and JANET RENO, in her official capacity as ATTORNEY GENERAL OF THE UNITED STATES,

Defendants.

----------X

Defendants having moved to dismiss pursuant to Fed. R. Civ. P 12 (b)(1) and the matter having come before the Honorable Kimba M. Wood, United States District Judge, and the Court thereafter, on February 7, 2001 having rendered its Order dismissing the action for lack of subject matter jurisdiction, it is

ORDERED, ADJUDGED AND DECREED: That for reasons stated in the Court's Order dated February 7, 2001, the action is dismissed for lack of subject matter jurisdiction: accordingly, this case is closed and all pending motions moot.

DATED : New York, New York, February 14, 2001

/s/

KIMBA M. WOOD
United States District Judge